Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 199.

CHARLES J. GLIDDEN, Trustee,
PLAINTIFF IN ERROR,

v.

JOHN H. HARRINGTON, Collector,
DEFENDANT IN ERROR.

In Error to the Superior Court of the Commonwealth of Massachusetts.

Brief of the Plaintiff in Error.

Statement of the Cause.

This writ of error is brought to reverse a judgment by the Superior Court of the Commonwealth of Massachusetts upon an action of contract, in the name of the collector of taxes of the city of Lowell in said commonwealth, the plaintiff below and now the defendant, to recover the sum of $2576, and interest, alleged to be a legal tax for the year 1889 upon the defendant below, now the plaintiff in error, as trustee.

The judgment is erroneous, as a deprivation to the plaintiff in error of his property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, in that the Massachusetts statutes allowing the assessment and the collection of the tax do not provide for notice and an opportunity to be heard.

The question in the cause is, substantially, whether it is consistent with due process of law to enforce the collection of a tax from a man by naming him a trustee without permitting him to prove that he had no property as trustee. The statutes under which the cause arises are the following: —

Revised Laws of Massachusetts, Title III. c. 12:

"Section 2: All property real and personal situated within the commonwealth, and all personal property of the inhabitants of the commonwealth wherever situated, unless expressly exempted by law, shall be subject to taxation."

"Section 23: All personal estate, within or without the commonwealth shall be assessed to the owner in the city or town in which he is an inhabitant on the first day of May.

"Fifth. Personal property held in trust by an executor, administrator or trustee, the income of which is payable to another person, shall be assessed to the executor, administrator or trustee in the city or town in which such other person resides, if within the commonwealth; and if he resides out of the commonwealth it shall be assessed in the place where the executor, administrator, or trustee resides, . . . and the tax thereon shall be paid out of said income."

"Section 41: Assessors, before making an assess-

ment, shall give seasonable notice thereof to the inhabitants of their respective cities and towns. Such notice . . . shall require the inhabitants to bring in to the assessors, before a date therein specified true lists of all their polls and personal estates not exempt from taxation."

"Section 47: They shall ascertain as nearly as possible the particulars of the personal estate, and of the real estate in possession or occupation, as owner or otherwise, of any person who has not brought in such list, and shall estimate its just value, according to their best information and belief."

"Section 48: Such estimate shall be entered in the valuation book, and, except as provided in sections forty-one and seventy-four, shall be conclusive upon any person who has not seasonably brought in a list of his estate, unless he can show a reasonable excuse for the omission."

"Section 73: A person aggrieved by the taxes assessed upon him may, within six months after the date of his tax bill, apply to the assessors for an abatement thereof; and if they find that he is taxed at more than his just proportion, or upon an assessment of any of his property in excess of its fair cash value, they shall make a reasonable abatement. A tenant of real estate paying rent therefor and under obligation to pay more than a moiety of the taxes thereon may apply for such abatement.

"Section 74: A person shall not have an abatement, except as otherwise provided, unless he has brought in to the assessors the list of his estate as required by section forty-one. An executor, administrator or trustee after three years from the date of

his appointment, or a tenant of real estate paying rent and under obligation to pay more than a moiety of the taxes thereon, may have an abatement although no such list was brought in. If such list is not filed within the time specified in the notice required by section forty-one, no part of the tax assessed upon the personal estate shall be abated unless the applicant shows to the assessors a reasonable excuse for the delay or unless such tax exceeds by more than fifty per cent the amount which would have been assessed upon such estate if the list had been seasonably brought in, and in such case only the excess over such fifty per cent shall be abated. If the applicant was not required by said notice to include his real estate in said list, and has not done so, he shall, if he seeks an abatement of the tax on his real estate, file with his application a list, verified as provided in section forty-three, of his real estate, with an estimate of the fair cash value of each parcel."

"Section 76: The assessors shall, within ten days after their decision upon an application for an abatement, give written notice thereof to the applicant.

"Section 77: A person aggrieved by the refusal of the assessors to abate a tax, may, within thirty days after receiving the notice provided in the preceding section, appeal therefrom by filing a complaint with the clerk of the county commissioners, for the county in which the property taxed is situated, and if upon a hearing the board finds that the property has been overrated, it shall make a reasonable abatement and an order as to costs. If the list required to be brought in to the assessors was not brought in within the time specified in the notice required by section forty-one, the

tax shall not be abated unless the appellate board finds that there was good cause for the delay or unless the assessors have so found as provided in section seventy-four. No costs shall be allowed to a complainant who has failed to file a list as required by law."

"Chapter 13, Section 32: If a tax remains unpaid for three months after it has been committed to the collector, he may maintain an action in his own name against the person assessed therefor in the same manner as for his own debt."

Although the above are the Revised Laws, enacted since 1889, they are substantially the same as the statutes then in force.

Facts.

Notice that they were about to assess taxes was given in the latter part of April, 1899, by the assessors to the inhabitants of the city of Lowell, by posting in public places. By this notice lists of all polls and personal estates not exempt from taxation were to be handed in on or before June 15, 1889. (Record, printed page 6.) The plaintiff in error was an inhabitant of Lowell. No list of personal estate held in trust was submitted by him.

July 25, 1889, Doomsday, the assessors voted to tax $160,000 to the plantiff in error as trustee. (Record, printed page 6.) Less than two months afterward, September 10, 1889, the warrant for the collection of the tax was committed to the collector. (Record, printed page 5.)

February 24, 1890, the plaintiff in error filed a statement that, although he was informed certain shares of stock

stood in his name as trustee, he was, in virtue of certain facts therein set forth, not the owner of said shares and not taxable therefor; and made application as trustee for abatement, on which application a number of hearings were had. (Record, printed pages 15, 21, 8.) Before abatement proceedings were determined this action was brought by a succeeding collector. The plaintiff in error secured an abatement of his individual tax, and this action has regard only to the tax assessed upon him as trustee. (Record, printed page 7.)

The testimony introduced at the trial in the Superior Court by the plaintiff, now defendant, shows that the defendant, now plaintiff in error, was assessed as trustee upon certain shares of the Northwestern Telephone Exchange, the Southwestern Telegraph and Telephone and the Cleveland Telephone companies which the assessors understood were held by him in trust for the Erie Telegraph and Telephone Company. The basis of valuation adopted by the assessors was the market price of the shares of the Erie Telegraph and Telephone Company. They divided the whole valuation of the capital stock of the Erie Telegraph and Telephone Company by ten, there being ten directors, and assessed each of seven of them, being residents of Lowell, one tenth. (Record, printed page 11.) There was no evidence that the assessors acted on information leading them to believe that the plaintiff in error held any shares of stock within the state, or that he had actual possession or control of any stock, or that he had the legal title to any particular number of shares. It does not appear that he held in trust any personal property upon which he could be taxed for the year 1889.

The defendant at the trial, now plaintiff in error, offered evidence tending to show that at the time of the

assessment of the tax he did not hold any personal property whatever as trustee; owned none of these shares; that said shares were owned by the Erie Telegraph and Telephone Company, and were in its possession and control; and further evidence, tending to show that the property was not taxable to him, and was not within the jurisdiction of the assessors, or of the state. (Record, printed pages 12, 13, 14.) This evidence was excluded by the court.

The court refused to give to the jury the instructions requested by the defendant, now plaintiff in error, touching the legality, validity, and constitutionality of the tax; and ruled that the only questions for the jury were, —

(*a*) Whether the assessors ascertained as nearly as possible the particulars of the personal estate held by the defendant as trustee, for the purpose of making this assessment, and, —

(*b*) Whether, having obtained those particulars, they estimated such property at its just value according to their best information and belief.

The jury found for the plaintiff, now defendant.

Among the instructions requested by the plaintiff in error, and refused by the court, are these:

"15. Through the manner in which this tax was levied its recovery in this action would be the deprivation of the defendant of his property without due process of law, contrary to the provisions of the Constitution of the United States.

"16. Through the method adopted by the assessors in arriving at the valuation for this tax its recovery in this action would be a deprivation of the defendant of

his property without due process of law, contrary to the provisions of the Constitution of the United States."

"26. The levy and collection of the tax for the recovery of which this action is brought are contrary to the provisions of section 1 of article XIV. of the amendments to the Constitution of the United States, and the action cannot be maintained."

"30. The maintenance of this action is contrary to the provisions of section 1 of article XIV. of the amendments to the Constitution of the United States, and the plaintiff cannot recover."

The plaintiff in error, being aggrieved at the rulings, opinions, and refusals of the Superior Court in matter of law, alleged exceptions thereto, which, being reduced to writing, were filed with the clerk, presented to the court, and allowed by the presiding judge. September 5, 1901, the constitutionality of the statutes was affirmed, and the exceptions were overruled by the Supreme Judicial Court of the Commonwealth; and October 7, 1901, judgment for the plaintiff, now defendant, was entered in the Superior Court.

Specification of Errors.

"2. The court erred in not ruling that through the manner in which this tax was levied its recovery in the action would be a deprivation to the defendant of his property without due process of law, contrary to the provisions of the Constitution of the United States.

"3. The court erred in not ruling that, through the method adopted by the assessors in arriving at the valuation for the tax, its recovery in the action would be a deprivation to the defendant of his property with-

out due process of law, contrary to the provisions of the Constitution of the United States."

"7. The court erred in not ruling that the levy and collection of the tax, for the recovery of which the action was brought, were contrary to the provisions of section 1 of article XIV. of the amendments to the Constitution of the United States, and that the action could not be maintained."

"10. The court erred in not ruling that the maintenance of the action was contrary to the provisions of section 1 of article XIV. of the amendments to the Constitution of the United States, and that the plaintiff could not recover."

The judgment is erroneous in this:

It is not consistent with due process of law, in the sense of the Fourteenth Amendment, for a state to compel a man who holds no property in trust and makes no return to the assessors, to pay a tax assessed against him as such trustee, without opportunity to show that he held no property in trust.

The cause comes to this court for re-examination of the final judgment in a suit which draws in question the validity of the Massachusetts statutes, and the authority exercised thereunder to make the judgment, on the ground of their repugnancy to the requirement of due process of law in section 1 of the Fourteenth Amendment to the Constitution of the United States.

The objection that the statutes are in conflict with the Fourteenth Amendment was clearly, seasonably, and repeatedly presented below, both in the Superior and the Supreme Judicial Courts. The judgment could not have been made without overruling this objection. As the stat-

utes are the only foundation for the judgment it is evident that the state courts held them sufficient, notwithstanding the constitutional objection to warrant a judgment for the collection of a tax upon property which the plaintiff in error was not permitted to show he did not have. (Record, printed page 30.)

I.

Interpretation of the Statutes by the Supreme Judicial Court of the Commonwealth of Massachusetts.

Sections 73, 74, 76, and 77 provide a remedy which, if the person assessed is an inhabitant of the town or city levying the tax, and has property subject to taxation by the assessors, is exclusive. He cannot recover such a tax if paid under protest, or defend in an action by the collector to collect it, on the ground that the assessment is partially unlawful.

Bates v. *Boston*, 5 Cush. 93.
Wright v. *Boston*, 9 Cush. 233.
Bourne v. *Boston*, 2 Gray, 494.
Davis v. *Macy*, 124 Mass. 193.

If any part of the property assessed is liable to taxation, no action will lie to recover back the tax paid under protest on another part of the property illegally assessed, nor can the person assessed defend against an action for such a tax.

Bourne v. *Boston*, 2 Gray, 494.
Chapel v. *Boston*, 120 Mass. 212.

Thus the only remedy for one who is properly taxable

here for some personal property, but who is taxed also for other personal property not liable to taxation here, is by an application for an abatement of the tax. In either case it is over-taxation or over-valuation.

Little v. *Greenleaf*, 7 Mass. 236.
Osborne v. *Danvers*, 6 Pick. 98.
Lincoln v. *Worcester*, 8 Cush. 55.

Whether the excess is due to placing too great a valuation upon property lawfully taxable or to including property for which the person is not lawfully taxable, there is merely an over-valuation, and the remedy must be by abatement.

Citations above.

In this respect the three classes of taxes, polls, personal property, and real property, are separate. If a person is properly assessable for any tax of a certain class, the inclusion of property of that class for which he is not properly assessable can be shown only in proceedings for abatement.

Salem Iron Factory v. *Danvers*, 10 Mass. 514.
Preston v. *Boston*, 12 Pick. 7.
Lincoln v. *Worcester*, 8 Cush. 55.

It now is held that, even though a portion of a certain class of property, for which a person is taxed, is taxed to him as trustee, the whole tax is taken together as a single tax of that class. He shall not be allowed to show that the tax placed upon him as trustee is not a valid one, when sued as trustee for that tax, even though the suit is for that tax alone.

An injunction does not lie to restrain the collection of a tax or assessment.

Brown v. *Springfield*, 97 Mass. 152.
Low v. *Charlestown*, 99 Mass. 208.
Norton v. *Boston*, 119 Mass. 208.

If the person taxed is within the jurisdiction of the assessors and they assess him, he can be relieved from his liability to pay only on application for an abatement, even if, in fact, he did not own or have in his possession the whole or any part of the property assessed, or even if such property were not in fact in existence. It being within the jurisdiction of the assessors to determine such facts, their finding is conclusive.

Where the person taxed was within the jurisdiction of the assessors the tax could not be recovered back because the person taxed did not in fact own or possess any property of the kind which was taxed to him.

The case of a man against whom a tax is assessed for property, no part of which is owned by him, is as much within the principle as if he owned some specific part of it. It is entirely immaterial whether or not the plaintiff in error did in fact hold as trustee any property whatever.

II.

The decisions of a state court upon the construction of its own statutes are final and are adopted by this court, without regard to this court's opinion upon its correctness.

State Railroad Tax Cases, 92 U.S. 617.
People v. *Weaver*, 100 U.S. 539.
Bell Gap Ry. Co. v. *Pennsylvania*, 134 U.S. 232.
McElvane v. *Bush*, 142 U.S. 155.
Wood v. *Brady*, 150 U.S. 18.

First National Bank v. *Ayers*, 160 U.S. 660.
Aberdeen Bank v. *Chehatis Co.*, 166 U.S. 440.
W. W. Cargill Co. v. *Minnesota*, 180 U.S. 452.

In *Columbus Southern Railway* v. *Wright*, 151 U.S. 475, the court says, —

> "Upon this writ of error we cannot of course review the construction which the Supreme Court has placed upon its own constitution and the law in question."

In *Pittsburg &c. Ry. Co.* v. *Backus*, 154 U.S. 425, the court says, —

> "The decision of the Supreme Court of the State removes from this case, all question of conflict between the act and the constitution of the State, and the only matter remaining for our consideration is whether there is in the act as administered any trespass upon rights, which the Federal Constitution secures to the plaintiff."

In *Commercial Bank* v. *Chambers*, 182 U.S. 556, Justice WHITE says, —

> "This construction of the statute by the State Court is binding on this Court."

Operation of the Statutes so Interpreted.

In case a person neglects to file a list, if the assessors have jurisdiction to assess him for any personal property whatever, they may include with the amount validly charged a tax upon property not owned by him or for

which he is not liable to be taxed; they may include a tax against him as trustee when he holds no property in trust whatever, and is not in any way liable as such, even though a tax on trust property is a separate one under the statutes, and is dependent upon the income received for the *cestui que trust*. Although the tax as trustee involves wholly different rights, which are recognized in the statute, the failure of the person assessed to file the list of property owned by himself personally gives the assessors the power to impose a tax upon trust property, payable out of the income which the statute recognizes rightfully belongs to the *cestui que trust*, even though such trust property is not in any way taxable or is wholly without the jurisdiction of the assessors and of the state. The neglect of a person to file a list of his personal effects opens the door to a tax against him in any capacity in which the assessors may deem him taxable and which he may have no reason to anticipate.

The only notice is a notice to bring in lists, and there is no notice as to the time and place of assessment, nor is there any notice as to what is to be assessed.

In these cases the demand becomes recoverable from him at once: his property may be seized or his person arrested.

As to an amount which may equal a tax on 50 per centum of the value of his individual property, the tax against him as trustee is conclusive without any judicial determination, and even though the assessors have no jurisdiction to assess such property.

With this exception a person so assessed may obtain a judicial hearing by the statutory method, *i.e.*, he may ask for abatement, but proceedings upon such request operate in no way to stay collection of the tax.

The effect of the statutes is to "doom" the defendant without any hearing whatsoever and with no notice further than the public notice to bring in a list.

Due Process of Law.

The federal requirement of due process of law extends to judicial as well as to legislative action of the states. The judgment of a court may invade the requirement, no less than a statute.

Chicago B. & Q. R.R. v. *Chicago*, 166 U.S. 226.

The collection of taxes is within the phrase "due process of law."

United States v. *Ferreira*, 13 How. 40.

The Massachusetts statutes, as interpreted by the Supreme Judicial Court, violate both the letter and the spirit of the federal Constitution. They authorize taking of property without adequate compensation, and without judicial determination of any kind. Where an excessive assessment has been made, suit may be brought by the collectors, and, even though proceedings for abatement have been begun, the defendant's property may be taken and his person arrested, without a hearing upon the merits of the demand. He may recover the excess taken from him provided he has handed in a list. But will the right to recover property taken without due process of law satisfy the Constitution, which says it shall not be so taken?

The courts have uniformly recognized the necessity of some sort of hearing before property can be seized under the power of taxation. Notice and an opportunity to be heard are essential to due process of law.

Violette's Heirs v. *City Council*, 92 Va. 561.
Bowler v. *Huston*, 30 Gratt. 273.
Cook v. *Gregg*, 46 N.Y. 442.
Happy v. *Mosher*, 48 N.Y. 317.
Overing v. *Foote*, 65 N.Y. 263.
Stuart v. *Palmer*, 74 N.Y. 183.
Patten v. *Green*, 13 Cal. 329.
Mulligan v. *Smith*, 59 Cal. 206.
Boorman v. *Santa Barbara*, 65 Cal. 313.
People v. *Pittsburg R.R. Co.*, 67 Cal. 625.
Brewster v. *Newark*, 11 N.J. Eq. 118.
Railway Co. v. *Savannah*, 96 Ga. 680.
Thomas v. *Gain*, 35 Mich. 155.
Kundenger v. *Saginaw*, 59 Mich. 355.
Marshall v. *McDaniel*, 12 Bush. 378.
Dorey v. *Skinner*, 57 Hun, 593.
Griswold v. *Davenport*, 65 Iowa, 633.
McFadden v. *Langham*, 58 Tenn. 579.
Rolfe v. *Columbia L.I. Co.*, 11 Mo. App. 378.
Darling v. *Gunn*, 50 Ind. 424.
Kuntz v. *Sumption*, 117 Ind. 1.
Griffin v. *Mixon*, 38 Miss. 424.
Neave v. *Weather*, 3 Q.B. 1072.
Murray v. *Hoboken L. & I. Co.*, 18 How. 276.
The Railroad Tax Cases v. *H. Sawyer*, 13 Fed. 72.
County of Santa Clara v. *Southern Pacific R.R. Co.*, 18 Fed. 385.
Meyers v. *Shields*, 61 Fed. Rep. 713.
Davidson v. *New Orleans*, 96 U.S. 97.
Palmer v. *McMahon*, 133 U.S. 660.

Lent v. *Tillson*, 140 U.S. 316.
Holden v. *Hardy*, 169 U.S. 366.
King v. *Mullen*, 171 U.S. 404.

See also cases cited in note to *Hager* v. *Reclamation District No.* 108, 111 U.S. 701.

In *Palmer* v. *McMahon* it is said, —

> "The imposition of taxes is in its nature administrative and not judicial, but assessors exercise quasi-judicial powers in arriving at the value, and opportunity to be heard should be given under all just systems of taxation according to value."

This definition of the assessor's duties requires that a hearing of some sort should be provided by the statute, of which a person may avail himself before his liability becomes fixed and his property liable to seizure. That the assessors have in a particular case given the person taxed an opportunity to be heard is not sufficient; the law itself must secure this right.

In *Stuart* v. *Palmer*, EARL, J., said, —

> "It is not enough that the owners may by chance have notice or that they may as a matter of favor have a hearing. The law must require notice to them, and give them a right to a hearing. The constitutional validity of the law is to be tested not by what has been done under it, but by what may, by its authority, be done."

The necessity of legal notice, in distinction from actual notice, was also emphasized in *Kuntz* v. *Sumption*. A

statute of Indiana authorized the Board of Equalization conclusively to change the valuation placed upon property by a taxpayer, or to add property to his list. The following provision was made as to notice: —

> "Two weeks previous notice of the time place and purpose of the meeting shall be given by the County Auditor in some newspaper of general circulation printed and published in the County, or if no newspaper is published in the County, then by posting up notices in three public places in each township in the County."

It appeared that in this case the plaintiff had received actual notice of the meeting of the Board and had been summoned as a witness to testify in regard to his own list. But the court held that the statute was unconstitutional; that there was no sufficient provision for notice to those whose lists might be increased; that this defect was not remedied by the actual notice which the plaintiff received. In the words of the court, "A notice not authorized by law is in legal contemplation no notice." The Massachusetts statutes, accordingly, must be judged with reference to express provisions as interpreted by the state courts, and not in the light of any facts which in a particular case at issue may have afforded actual notice or given an opportunity, informally and outside of any statutory provisions, to be heard before the assessors.

The kind of notice necessary:

> "A notice essential to confer jurisdiction upon any tribunal in any proceeding must point to the party to whom it is addressed, to the tribunal in which, and

to the time when, and to the place where, he may be heard in that proceeding."

State v. *Perth Amboy*, 29 N.J.L. 259.
State v. *Plainfield*, 38 N.J.L. 96.
State v. *Bayonare*, 49 N.J.L. 313.
Lent v. *Tillson*, 140 U.S. 316.

Due process of law implies the right to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

Zeigler v. *Alabama R. Co.*, 58 Ala. 594.
McGavock v. *Omaha*, 40 Neb. 75.

A distinction is to be made, in considering the legality of assessment laws, between cases where taxes can be collected by distraint or arrest and cases where the inhabitant has an opportunity to defend in court.

In *Davidson* v. *New Orleans*, 96 U.S. 97, Mr. Justice MILLER states the general rule on this point: Whenever, by the laws of a state or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or for some limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the

property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

In the case of *Meyers* v. *Shields* the determining reason given by the court for holding the statute invalid was the *possibility that the property of the person assessed might be seized before he could have a hearing*. It was suggested that if the tax had been collectible only by legal proceedings in which the petitioner could be allowed a defence, the acts would have been upheld.

A case like that suggested by the court in *Meyers* v. *Shields* was presented in *Hager* v. *Reclamation District*, 111 U.S. 701:

A California statute provided for an assessment for reclaiming swamp land, to be levied on the land owners to be benefited thereby. It was contended that this law was unconstitutional, because no provision was made for notice or for a hearing. The statute was sustained by this court on the ground that the assessment could be enforced only by judicial proceedings in which any defence going to the validity or amount of the tax could be pleaded. Mr. Justice FIELD said, —

> "In ordinary taxation assessments, if not altered by a Board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California for the purpose of reclaiming overflowed and swamp lands can be enforced only by suits, and of course to their validity it is essential that notice be given to the taxpayer and opportunity be afforded him to be heard

respecting the assessment. In this he may set forth by way of defense all his grievances."

There are rights iu every free government beyond the control of the state, and the theory of our government, state and national, admits of no place for the deposit of unlimited power.

In due process of law it was part of the cause of the plaintiff, now defendant, to show that the defendant, now plaintiff in error, was a trustee, and that he held some property as such.

Examining the Massachusetts statutes in the light of these decisions, it is submitted that they are open to serious objections, especially as regards their effect on the inhabitant who, through negligence or mistake, has failed to submit a list. It does not appear that he receives notice of the amount of his assessment until he receives a tax bill.

No provision is made for submitting the lists for public inspection at any particular time, nor, if such provision were made, does it seem that proper notice would be thereby given to one who had been assessed for an amount beyond that stated in his list, or to one who had failed to hand in a list. Granting that a tax bill constitutes legal notice, no fixed period is established by law before the collector may make demand. Fourteen days after demand property or person may be taken, or three months after the tax has been committed to the collector he may bring suit in his own name, in which case only those defences are allowed which go to the jurisdiction of the assessors or the legality of the whole tax. No provision is made that a petition for abatement shall act as a stay of proceedings for collecting the tax; on the contrary, the statute provides for

abatement only in cases in which the tax has actually been paid.

It appears, then, that from the beginning of assessment proceedings to the seizure of his property, the inhabitant has never received legal notice of the fact that he is to be or has been assessed for a tax, together with an opportunity to be heard, before the tax becomes a fixed claim against him. His property is taken from him without due process of law, and his only remedy is to recover back the excess tax under statutory proceedings. This does not comply with the constitutional requirements as set forth in the cases above cited.

Opportunity to redeem property forfeited under the statute was given under the statute invalidated by the decision in *Marshall* v. *McDaniel*. So also in *Railway Co.* v. *Savannah*, 96 Ga. 680, where the city charter provided for appointment by the board of aldermen of assessors to assess damage caused by the construction of highways, no provisions for notice to property holders being included, nor for the promulgation of their decision when made, it was held that the statute was not rendered valid by the provision that any property holder affected might appeal to a jury in a superior court.

See further, *Violette's Heirs* v. *City Council*, 92 Va. 561.

From these cases it appears that it is not enough that a remedy be given by which property taken without a hearing may be recovered; there must in all cases be notice and a hearing before any seizure of property can take place.

The Dooming Board of the Commonwealth of Massachusetts has no parallel except in the records of the Mid-

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dle Ages and of the Inquisition, and constitutes in itself a satire upon any claim to the enjoyment of a free and enlightened governm :nt.

Effect on Trust Estates.

Whatever hardship there is to the individual citizen under the Massachusetts taxation laws, it is greatly increased when it is sought to hold an inhabitant as trustee under the general provision of the statutes. Such enactments in effect deprive the *cestui* of his property without due process of law. The rules governing the taxation of trust property are more complex than those governing individual property. If the trustee should confuse the trust fund with his own, he could be civilly and in a proper case criminally liable, but the law seeks to render him, for taxation purposes, a single person, and all property which he holds, in whatever capacity, as a single fund for purposes of taxation, so far as regards the necessity for submitting a list and for paying the whole tax levied, before making any effort to secure an abatement. As an individual it is claimed that, being an inhabitant and having at least a poll, he is obliged to bring in a list of his property, and that the public notice requiring such action is sufficient notice to him. Can the same, even if sound, be said of him as trustee? Has he any notice that a list of trust property is required of him unless he has to his own knowledge and within the jurisdiction of the assessors property of that character? The rights really concerned are not those of the trustee, but those of the *cestui*. These rights should not be required to stand or fall with those of the person acting as trustee regarding his dependent property. The *cestui* has a right to demand that his trustee shall have notice as trus-

tee that an assessment is to be made, and that he shall have an opportunity to be heard on such an assessment. If as trustee he holds no property taxable by the state he is as trustee not guilty of any neglect of the statutory requirements. Nevertheless, because as an individual he has failed to hand in his list he must pay in a fiduciary capacity any tax that the assessors deem fit in good faith to assess.

The Penalty for Failing to File a List.

The Massachusetts statutes discriminate against the inhabitant who has failed to bring in a list. Discrimination of some sort is usual in several states and may be unobjectionable, but it cannot go to the extent of inflicting a penalty without a trial. Under these statutes a penalty may be inflicted upon a person without any judicial hearing whatever, and without notice, which penalty is the forfeiture of an amount equal to the tax upon 50 per centum of the value of his taxable property.

An instance of unconstitutional discrimination is found in *The Railroad Tax Cases* v. *H. Sawyer*, 13 Fed. 722.

The constitution of California provided that the State Board of Equalization should assess and equalize the value of railroad property running through more than one county, that an officer of the railroad should furnish to the Board a statement signed and sworn to by him, showing the property of the company, etc., and that if the officer designated should fail to make and furnish such statement the Board should proceed to assess the property, the valuation fixed being final and conclusive. This provision was held unconstitutional by the Circuit Court of the United States as depriving the railroad companies of their right to a hearing.

In *Meyers* v. *Shields*, 61 Fed. 713, a statute of Ohio provided that "if any person whose duty it shall be to make a return or list of property . . . shall make a false return or shall avoid making a return, it shall be the duty of the County Auditor to ascertain the true amount of the taxable property, moneys, credits, and effects, that such person ought to have returned or listed and to add thereto fifty per centum of the amount so ascertained." Provision was made for notice to the taxpayer, and distraint could be made upon his goods for the amount of the tax. Under this statute an assessment for five years' back taxes was levied on property which it was alleged the petitioner had failed to return, with no further notice from the auditor than an order to show cause why errors in the tax returns of the petitioner should not be corrected, without naming the years during which the errors were alleged to have been committed.

It was held that the tax was unconstitutionally levied, and an injunction was granted restraining its collection.

This court has recently, *King* v. *Mullins*, 171 U.S. 404, approved the reasoning of an early Kentucky case declaring invalid penalties imposed without a hearing. The state of Kentucky had enacted by statute: "Any person . . . claiming lands in this state, and failing to list the same for taxation," and filing such list "With the auditor on or before the first day of October next, shall in consequence of such failure forfeit his or her claim to this Commonwealth." It was held that this statute could not *ipso facto* divest the claimants to lands of their titles, but that in each case an inquest was essential and judicial judgment necessary to forfeit. Afterward, it was enacted that —

"in all cases when any land shall hereafter be for-

> feited for failing to list the taxes or stricken off to the state, the title of such land shall vest in this commonwealth by virtue of this act without any inquest . . . unless said land shall have been redeemed according to law."

The case of *Marshall* v. *McDaniel*, 12 Bush. 378, involved the constitutionality of this latter act. The act was declared unconstitutional. LINDSAY, C.J., said,—

> "It is clear the legislature may impose upon the tax payer the duty of listing his property for taxation and may prescribe, for neglect of the duty so imposed, penalties reaching even to the forfeiture of the property involved. But when such laws are enacted the forfeiture prescribed must be regarded as penalties, and they cannot be inflicted until inquiry has first been made, and the commission of the offense ascertained by due course of law. To enjoin what shall be done or what left undone, and to secure obedience to the injunction by appropriate penalties, belongs exclusively to legislation. To ascertain a violation of such injunction and inflict the penalty belongs to the judicial function. We conclude without hesitation that so much of the Act of 1825 as provided that for a mere failure to list lands for taxation the title should be forfeited, and should, *ipso facto*, without inquiry or trial, and without opportunity to the party supposed to be in default even to manifest his innocence, be vested in the Commonwealth, is unconstitutional and void."

It is clear that in cases like that now before the court a notice is necessary. The chief question is, was the public notice to bring in lists sufficient? It has been held directly

in California, as cited above, that such a notice is not sufficient, and that such a statute is unconstitutional. The last case above cited also directly affirms our contention, and in addition adds a new phase in the matter, which is touched upon more or less directly in the other United States cases which we cite, and that is, there must be an opportunity to be heard, and an opportunity for inquiry or trial after the assessment. That is, following out the idea expressed in the case last cited, the failure to bring in a list lay the taxpayer open to a penalty, and this cannot be imposed without an opportunity to be heard. But more than this, the public notice to bring in lists was simply a mandate or direction to take a preparatory step, and was in itself no notice of an opportunity for a hearing to contest the validity or amount of a tax, and no such opportunity is given.

The rule is broadly stated as follows: —

> "A law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the 14th amendment to the Constitution which declares that no State shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection."
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> *Winona St. Peter Land Co.* v. *Minnesota*, 159 U.S. 526.

In each of the cases cited in *Winona* v. *Minnesota*, except the case of *Pittsburg, C.C. & St. L. R. Co.* v. *Backus*, upon the statute discussed, the taxpayer was expressly given the right to have the validity and amount of the assessment judicially determined after the assessment.

Upon the facts in *Pittsburg, C.C. & St. L. R. Co.* v. *Backus*, the taxpayer had actual notice and had an actual hearing upon the amount of the assessment before the assessment was made.

Admitting, for the sake of argument, that a hearing before the assessment is sufficient, it is a hearing, or an opportunity for a hearing, which is essential. In the case before the court there was neither a hearing nor an opportunity for a hearing. So far as it was a notice at all it was merely a notice to bring in a list. For the failure to do this, an innocent omission on the part of the defendant, now plaintiff in error, there is a penalty prescribed. In either light, — in the light of a penalty or in the light of a notice for an assessment, — giving the present notice every legality, there was absolutely no opportunity for a hearing or for a complaint.

The court in *Hager* v. *Reclamation Dist.*, referring to the case of *Davidson* v. *New Orleans*, says, —

> "An assessment levied on certain real property in New Orleans for draining the swamps of that city was resisted, on the ground that the proceeding deprived the owners of their property without due process of law; but the court refused to interfere, for the reason that the owners of the property had notice of the assessment and an opportunity to contest it in the courts."

In *Griffin* v. *Mixon*, 38 Miss. 424, a statute provided that, upon the first Monday in April in each year, the tax collector should return to the Board of Police a list of lands delinquent for non-payment of taxes thereon, and that after prescribed verifications the list should be filed

with a public officer and should vest the titles to the lands and lots therein returned in the state, impeachable only on proof of payment of tax before the list was returned. It was held that this statute was unconstitutional because there was no provision for a judicial judgment before the forfeiture of the difference between the tax and the value of the land became final. Chief Justice MARSHALL is quoted from *Fletcher* v. *Peck*, 6 Cranch, 87:

> "To the Legislature all legitimate power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of legislative power, is well worthy of serious reflection."

It is not within the power of the legislature by a simple act to deprive a person of his property by declaring it shall be forfeited to the state. A judicial judgment is necessary under our constitution and form of government.

The requirement that a tax must be paid before abatement may be had, may exist in cases where the delinquent has had an opportunity for a hearing before the assessors, but it has never been upheld in cases where payment may be enforced before any hearing can be had. Some opportunity for a hearing must be given before a man's property can be taken from him. Even the most summary proceedings authorized by law for the collection of a debt claimed to be due the state imply that a hearing of some sort shall be given before liability becomes fixed.

> "There can be no proceedings against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules

established in our system of jurisprudence for the security of private rights."

FIELD, J., 111 U.S. 708.

Points and Citations.

In a large number of cases taxes have been sustained on one of the following grounds, no one of which exists in the present case: —

1. That the tax was definite, and the amount not dependent on valuation; as a license fee, —

McMillen v. *Anderson*, 27 Iowa An. 18; Id. 95 U.S. 37;
Gillette v. *City of Denver*, 21 Fed. 822, —

or an assessment at a definite rate per front foot, —

Parsons v. *Dist. of Col.*, 170 U.S. 45.

2. That the tax was definite in amount with regard to a certain species of property, and not subject to any decision by assessors on the score of valuation.

Merchants Bank v. *Pennsylvania*, 167 U.S. 461.
Bells Gap R.R. Co. v. *Pennsylvania*, 134 U. S. 232.

3. That a hearing was provided for either expressly by the statute or under the judicial interpretations of the statute by the state court, before the tax could be finally assessed or collected.

Wright v. *Davidson*, 181 U.S. 371.
Goodrich v. *Detroit*, 184 U.S. 432.

Wurts v. *Hoagland*, 114 U.S. 606.
Harding v. *Kaw Valley R.R. Imp. Co.*, 130 U.S. 539.
Lent v. *Tillson*, 140 U.S. 316.
Meyerhaeuser v. *Minnesota*, 176 U.S. 550.
Paulson v. *Portland*, 149 U.S. 30.
Fall Brook Irr. Dist. v. *Bradley*, 164 U.S. 112.
Winona v. *St. Paul Land Co.*, 159 U.S. 526.
Gallup v. *Schmidt*, 183 U.S. 300.
Palmer v. *McMahon*, 102 N.Y. 76.
McMahon v. *Palmer*, 133 U.S. 660.
Bellingham Bay B.C. R. Co. v. *New Whatcom*, 172 U.S.

4. That an injunction lay to prevent collection of the tax, or that it could be collected only through the courts, in either of which proceedings a full defence to the tax or assessment could be set up.

Davidson v. *New Orleans*, 96 U.S. 97.
Hager v. *Reclamation Dist.*, 111 U.S. 701.
Ky. R.R. Tax Cases, 115 U.S. 321.
McMillen v. *Anderson*, 95 U.S. 37.
Walston v. *Nevin*, 128 U.S. 578.
Keel v. *Board of Directors*, 59 Ark. 513.
Murdock v. *Commissioners*, 44 Fed. 726.

5. That the assessments complained of were not particular assessments on individuals, but were fixed by the board on certain classes of property, or were equalized by a state board, not among individual property holders, but by counties; and that the purpose for which the board met and the time and place of meeting being either set forth by

public notice or fixed by statute, a person interested had an opportunity for a hearing.

Ky. R.R. Cases, 115 U.S. 321.
Bell Gap R.R. Co. v. *Pennsylvania*, 134 U. S. 232.
Pittsburg &c. Ry. Co. v. *Backus*, 154 U.S. 421.
Sanford v. *Poe*, 69 Fed. 546.
Merchants Bank v. *Pennsylvania*, 167 U.S. 461.
McLeod v. *Receiveur*, 71 Fed. 455.
Pittsburg &c. Ry. Co. v. *Backus*, 133 Ind. 625. Distinguished from *Kuntz* v. *Sumption*, 117 Ind. 1.
Id. 154 U.S. 421.
Ky. R.R. Tax Cases, 115 U.S. 321.
State v. *Jones*, 51 Ohio St. 492.
People v. *Turner*, 117 N.Y. 227.

For the foregoing reasons the decision of the state courts is erroneous, and the Doomsday statutes should be declared in conflict with section 1 of the Fourteenth Amendment of the Constitution of the United States. The judgment cannot be sustained consistently with the fundamental conception of due process of law, or with the views hitherto expressed by this court. The judgment below should be reversed and the cause remanded with the usual directions.

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